

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1324

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1324

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MOTEN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA
FOR REHEARING AND SUGGESTION OF
REHEARING EN BANC

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DANIEL J. BELLER,
FREDERICK T. DAVIS,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

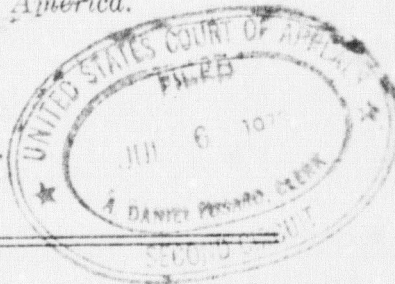


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	1
Reasons for this Petition	3
ARGUMENT:	
The Panel Incorrectly Decided an Issue of Major Significance for the Due Administration of Jus- tice	5
CONCLUSION	15

TABLE OF CASES

<i>Gersh v. United States</i> , 328 F.2d 460, 463 (2d Cir.), cert. denied, 377 U.S. 992 (1964)	10
<i>In Re Grand Jury Subpoena Served Upon Doe</i> , 551 F.2d 899 (2d Cir. 1977)	4, 7, 10, 11
<i>King v. United States</i> , Dkt. No. 77-2106, slip op. 2929 (2d Cir. May 5, 1978)	4, 5, 9, 12
<i>Miller v. United States</i> , 403 F.2d 77 (2d Cir. 1968)	4, 5, 7
<i>United States v. Allied Stevedoring Corp.</i> , 258 F.2d 104 (2d Cir.), cert. denied, 358 U.S. 841 (1958)	6, 12
<i>United States v. Crosby</i> , 294 F.2d 928 (2d Cir. 1961)	5
<i>United States v. Dioguardi</i> , 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974)	4, 5

4

	PAGE
<i>United States v. Franks</i> , 511 F.2d 25 (6th Cir.), <i>cert. denied</i> , 422 U.S. 1042 (1975)	4, 5
<i>United States v. Franzese</i> , 525 F.2d 27 (2d Cir. 1975), <i>cert. denied</i> , 424 U.S. 921 (1976)	6, 12
<i>United States v. Moten</i> , Dkt. No. 77-1324, slip op. 3097 (2d Cir., May 19, 1978)	1, 3
<i>United States v. Moten</i> , 564 F.2d 620 (2d Cir. 1977), <i>cert. denied</i> , — U.S. — (1978)	2, 4, 7, 11

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1324

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MOTEN,

Defendant-Appellant.

**PETITION OF THE UNITED STATES OF AMERICA
FOR REHEARING AND SUGGESTION OF
REHEARING EN BANC**

Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *en banc*, of that part of the opinion of a panel of this Court (Meskill, Friendly and Smith, C.JJ.), dated May 19, 1978, reversing and remanding for further proceedings an order of the United States District Court for the Southern District of New York, by the Honorable Richard Owen, United States District Judge, denying defendant-appellant Moten's motion for permission to interview members of the trial jury that convicted him. *United States v. Moten*, Dkt. No. 77-1324, slip op. 3097 (2d Cir., May 19, 1978).

Statement of the Case

Indictment 76 Cr. 324, filed on April 5, 1976, charged Moten and thirty-two other defendants in forty counts with violations of the federal narcotics laws. Trial of twenty-two defendants commenced on August 10, 1976. On September 20, 1976, approximately seven weeks after the start of the trial, the district judge was advised by

counsel for one of the defendants, Sebastian Intersimone, that a juror, William Keno, had spoken to Intersimone's sister in a manner suggesting the possibility that Keno had been corrupted. After interviewing both the sister and Keno, Judge Owen excused the juror. Thereafter, the trial court revealed the incident to all counsel, conducted a *voir dire* of the entire jury, despite the objection of several defendants including Moten, found that the jury had not been tainted and continued the trial. On November 12, 1976, after six and one-half days of deliberations, the jury returned verdicts of guilty against seventeen defendants, acquitted four, and failed to reach a verdict as to one. The convictions of all defendants were affirmed on direct appeal in *United States v. Moten*, 564 F.2d 620 (2d Cir. 1977), an opinion which, *inter alia*, specifically approved the District Court's handling of the juror incident.

On January 31, 1977, after the defendants had had an unrestricted opportunity to interview jurors for two and one-half months, Judge Owen entered an order prohibiting contacts between defendants' attorneys and the trial jurors without prior approval of the court.* The judge noted, however, that he would permit interrogation of the jury upon a proper showing. Thereafter, on February 18, 1977, Moten sought discovery of certain sealed materials and requested permission to interview the jury, claiming the possibility that other jurors had been tainted. Moten's motion was based principally upon the ambiguous and hearsay allegations contained in an affidavit of Intersimone's trial counsel, David "Doe," which suggested Doe's "understanding" from Intersimone's sister that another juror might have been present with Keno at the

* On January 31, 1977, just prior to being sentenced, Intersimone moved the Court for permission to interview the trial jurors. The Court denied the motion. Intersimone's attorney neglected to advise the Court that he had in fact privately interviewed the jury forelady for more than one hour on January 14, 1977, during which Ms. Blau stated that the jury had no knowledge of the reasons for Keno's removal.

time of the initial approach. The District Court received submissions of the parties and heard extensive argument on March 24, 1977. In a written opinion, dated June 30, 1977, Judge Owen concluded that no competent showing had been made to support the claim of taint. Accordingly, he denied the request for a *voir dire* of the jury.

On appeal from this order, a panel of this Court reversed the district judge's order and remanded for a *voir dire* of the jury. Acknowledging that the case raised "important questions," *United States v. Moten, supra*, slip op. at 3098, the panel reached the extraordinary conclusion that the events at trial supported "a reasonable suspicion that the jury may have been corrupted" and that such suspicion warranted a second *voir dire* of the jury in the post-trial setting.* *Id.*, slip op. at 3121.

Reasons For This Petition

The panel's opinion should be reheard by the panel or by the Court *en banc*, for two principal reasons.

First, the panel incorrectly decides an issue of vital importance to the administration of justice, and does so in a way that inevitably casts doubt upon the vitality of established precedent in this Circuit. By compelling a post-trial *voir dire* of the jury in this case upon a showing by the defendant that was incompetent in form and ambiguous in substance, the panel fails to adhere to the rule, consistently applied by this Court heretofore, that a defendant must come forward with clear evidence of

* With respect to the sealed materials, consisting of *in camera* testimony by "Doe," Ms. Intersimone and juror Keno, and grand jury testimony of Ms. Intersimone, Keno and "Doe," Judge Owen examined the materials and found nothing in them to aid Moten. Accordingly, the district judge declined to order the materials produced. The panel's decision, however, requires production of the Intersimone and Keno statements absent a compelling showing by the Government. The Government does not seek rehearing with respect to this aspect of the panel's opinion.

extraneous influence before a post-verdict inquiry of the jury is required. *King v. United States*, Dkt. No. 77-2106, slip op. 2929, 2940 (2d Cir. May 5, 1978); cf. *United States v. Dioguardi*, 492 F.2d 70, 78-80 (2d Cir. 1974). The district judge, who was fully familiar with the trial record, concluded that no competent showing had been made and that a second *voir dire* was not required, a decision firmly committed to his discretion. *Miller v. United States*, 403 F.2d 77, 83-84, n.11 (2d Cir. 1968); *United States v. Franks*, 511 F.2d 25, 38 (6th Cir. 1975). That conclusion rested soundly upon his own familiarity with the mid-trial *voir dire*—a proceeding previously held proper by two panels of this Court in *In Re Grand Jury Subpoena Served Upon Doe*, 551 F.2d 899, 901-02 (2d Cir. 1977) (Lumbard and Oakes, C.JJ.; Bonsal, D.J.) and *United States v. Moten*, *supra*, 564 F.2d at 629 (Lumbard, Gurfein and Mulligan, C.JJ.), and which established the lack of taint—and upon the absence of any direct showing on this motion in the post-trial setting. Nevertheless, despite the weakness of defendant's showing and the obvious discretion with which the judge was empowered to consider the motion, the panel summarily rejects the district judge's explicit finding, reached after considerable deliberation, and remands not merely for further proceedings in limited additional respects, but for a full-dress investigation of the entire jury. Since the panel fails adequately to explain its disagreement with the trial judge, the panel's decision leaves district judges without a workable standard to apply in future cases.

Second, the panel's decision promises confusion and uncertainty not only in the administration of the particular case under review but in future criminal cases as well, at the grave expense of important public policy considerations. In securing a post-trial hearing on their weak showing, the notorious narcotics traffickers convicted in this case are rewarded for their prior misconduct in tampering with a trial juror, and are now afforded an opportunity in the post-trial setting to embark upon a course

the precise purpose of which is to allow jurors to impeach their verdict two years after it was announced. In obtaining this result, the panel opinion effectively converts what has heretofore been, for compelling reasons of public policy, an extraordinary procedure into a routine one and thereby jeopardizes the vital public interest in securing final judgments in this and future criminal cases.

ARGUMENT

The Panel Incorrectly Decided an Issue of Major Significance for the Due Administration of Justice.

This Court consistently has disapproved post-verdict interviews of jurors, absent compelling circumstances. Mindful of the obvious potential for juror harassment, inhibition of jury deliberations, a deluge of frivolous post-verdict applications, an increase in opportunities for jury tampering, and the evils of uncertain verdicts, see *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961); *United States v. Dioguardi*, *supra*, 492 F.2d at 79-80, the Court has required that defendants place before a district judge compelling evidence of misconduct before a post-verdict inquiry will be justified. Furthermore, district judges are vested with broad discretion in deciding a post-trial motion for a *voir dire* of the jury. *Miller v. United States*, *supra* 403 F.2d at 83-84, n.11; *United States v. Franks*, 511 F.2d 25, 38 (6th Cir. 1975). Indeed, this Court only recently reaffirmed the long-standing rules governing the area of post-verdict jury interrogations in *King v. United States*, *supra*, Dkt. No. 77-2106, slip op. 2929 (May 5, 1978) (Feinberg, Oakes, C.J.J.; Wyatt, D.J.), where the Court held that "[t]o authorize a post-verdict inquiry [with regard to jury taint], there must be 'clear evidence', 'strong evidence', 'clear and incontrovertible evidence', 'substantially if not wholly conclusive evidence'." *Id.*, slip op. at 2940.

The panel opinion in this case, while stating its adherence to these well-settled principles, fails to give

them due accord. By ordering a second *voir dire* upon the weakest of evidentiary showings, the panel opinion creates an alarming precedent that should not be permitted to stand. Specifically, the panel fails to explain whether, or in what fashion, the showing before the district judge met the "strong evidence" standard required by *King*. Indeed, the panel ignores the fact that the core of the defendant's showing—the "Doe" affidavit—was plainly hearsay which the district judge, in his discretion and under the circumstances of the case, had a right to reject. *United States v. Allied Stevedoring Corp.*, 258 F.2d 104, 105-06 (2d Cir. 1958).

The panel concludes that "a series of events occurred at trial that support a reasonable suspicion that *the jury* may have been corrupted." Slip op. at 3121 (emphasis added). While the evidence supports a suspicion that *a single juror* was corrupted, the panel erred in reaching the broader conclusion. While the opinion does not clearly explain whether the remand results from lingering doubts as to the adequacy of the initial *voir dire* or independently from the showing made in the post-trial setting, we submit that under either view the panel's concern that any juror other than Keno was involved in or knew of jury tampering is unjustified. Indeed, an analysis of the record shows but the scantest evidence supporting the claim of taint. Either because it overestimated the showing made by the defendant, or because it failed to apply the proper legal standard, the panel incorrectly decided that a basis in the record existed to *voir dire* the jury a second time. The district judge properly concluded, however, that no new evidence had been presented to him in the post-trial motion to warrant a renewed inquiry, a decision firmly committed to his discretion.*

* Judge Owen adopted the proper approach, best illustrated, in the Government's view, by Judge Friendly's opinion in *United States v. Franzese*, 525 F.2d 27 (2d Cir. 1975) which fully

[Footnote continued on following page]

It bears initial emphasis that at least up to the time Moten filed his present motion, the trial judge had done all that was required to conduct a satisfactory and thorough inquiry into the possibility of taint. During the trial, Judge Owen conducted a full *voir dire* of the jurors, individually and *in camera*, with respect to whether anyone had sought to discuss the case with them, or whether the jury had been discussing the case among themselves. This *voir dire*—which took place after the removal of the one juror who may have been corrupted and which sought to determine whether other members of the jury may have been tainted—removed any claim of prejudice the defendants may have had as of the date of the verdict. Indeed, two other panels of this Court have in effect so found. *United States v. Moten, supra*, 564 F.2d at 629; *In Re Grand Jury Subpoena Served Upon Doe*, 551 F.2d 899, 901-02 (2d Cir. 1977).^{*} Accordingly, the narrow question before the district judge on the motion for a new trial was whether new evidence of sufficient reliability and persuasiveness had been adduced since the verdict to require a second *voir dire*.^{**} More significantly, the narrow

analyzes the post trial submissions in that case and concludes that a hearing was not required where a claim of misconduct was supported solely by an inconclusive hearsay affidavit. *Id.*, at 31 n.7.

^{*} These cases have an important bearing upon the question in issue here, a bearing not addressed by the panel opinion. In expressly approving the district judge's handling of the jury incident, these decisions support the view that based upon all the information before the judge at the time of trial, the removal of Keno and the *voir dire* of the jury guaranteed the defendants a fair trial. Indeed, if the panel that decided *Moten I* had thought differently, it would have reversed the defendants' convictions, or remanded for further proceedings. Accordingly, the affirmance necessarily implies that in the post-trial setting in order to secure a second jury *voir dire* the defendants were required to put before the judge new evidence of taint. This they wholly failed to do.

^{**} Indeed, this Court placed exactly such a requirement on defendants long before this case. In *Miller v. United States, supra*, 403 F.2d 83-84, n.11, the Court noted that "[w]here . . . the incident was explored before submission to the jury, the trial

[Footnote continued on following page]

question properly before the panel on this appeal, and never directly addressed by it, was whether the District Court abused its discretion in concluding that Moten failed to present the "strong evidence" and compelling showing required by *King* and its predecessors to compel the relief requested.

Because the panel opinion fails to accord sufficient deference to the findings of the trial judge it incorrectly interprets the scanty showing made by Moten on his post-trial motion. The trial judge had before him a collection of unsworn, hearsay and irrelevant documents submitted by the defendant post-trial. These included a surreptitiously obtained tape recording of an unsworn interview of the jury forelady, Ms. Blau, conducted on January 14, 1977; an unsworn two-page letter by Ms. Blau; an affidavit signed by Ms. Blau which restated the first but not the second page of the earlier letter; an affidavit of a private investigator providing a chronology of his meetings with Ms. Blau; and hearsay affidavits from Moten's appellate counsel, Ivan Fisher, and Intersimone's trial counsel, David "Doe". In addition, at the District Court's request, the Government submitted for *in camera* review grand jury testimony of Ms. Intersimone, Keno and "Doe" and sealed proceedings consisting of statements by "Doe", Ms. Intersimone and Keno made to the district judge during trial.*

None of these documents, taken either alone or assembled together in a strained effort to cast doubt upon the propriety of the jury's verdicts, offered clear evidence that another juror besides Keno had been involved in

judge's initial appraisal of the ability of the jurors to render a fair verdict should stand unless it is manifestly unreasonable... or significant new objective facts are developed." Neither condition obtained here.

* Moten's counsel told the district judge on March 24, 1977 that he had obtained copies of all sealed *in camera* proceedings except Keno's statement. Neither the district judge nor the Government released these papers to Moten.

misconduct, or that the jury in any way had been tainted by developments at trial.* Even the "Doe" affidavit, which comes closest to the point, and upon which the panel appears to have relied, was at best "frail and ambiguous." *King v. United States, supra*, slip op. at 2940. The "Doe" affidavit merely related Intersimone's attorney's "understanding" that "according to Ms. Intersimone, [Keno] was not alone at the time he spoke to her," and that Keno had been speaking with a man, who may have been another juror, before he approached her. The affidavit, however, was rank hearsay lacking any measure of reliability and, in the circumstances of this case, patently was insufficient to make the showing of "clear and incontrovertible evidence" prerequisite to a post-trial hearing.

First, "Doe's" affidavit is extraordinarily ambiguous, stating only his "understanding" that Ms. Intersimone had spoken with someone who "may" have been a juror. Second, "Doe's" affidavit goes on to state that as soon as the trial prosecutor expressed an interest in pressing the inquiry, Ms. Intersimone stated "she was unable to positively identify the person who had been with Keno." Third, Judge Owen had before him sworn testimony of Ms. Intersimone that contradicted, indeed repudiated, the lawyer's affidavit. When questioned in the grand jury under oath on the very same day, Ms. Intersimone stated

* The panel may have been under the impression that the prosecutor failed to relay the "Doe" information to the district judge and that the judge was not fully informed of the situation prior to his *voir dire* of the jury. This was not the case. As Judge Owen pointed out at the argument on the new trial motion, he had been advised that Ms. Intersimone withdrew her claim regarding a second juror on the same day she had made it. (Minutes of March 24, 1977, Tr. 31). Thus, even the "Doe" affidavit was not new evidence before the district judge. It hardly need be said that the Government had the greatest interest at trial in learning if other jurors were involved in the corrupt plan and would not have willingly continued with the trial for another seven weeks had there been a reasonable suspicion that other corrupt jurors remained on the case.

that although Keno was talking to another man before he approached her,* "I didn't see who the man was," and "I couldn't say anything about him, all I saw was the back of him," and that she could not even tell his race. (Grand Jury Transcript, September 20, 1976, 46-47). Fourth, the record clearly established that Ms. Intersimone was available to be interviewed by the defendants after trial; accordingly, the failure to submit an affidavit by Ms. Intersimone attesting at the very least to her belief that Keno had been with another juror was a fact the trial judge could not ignore in evaluating the weight to be given to the "Doe" affidavit. Finally, and perhaps most significantly, although "Doe," by his own affidavit, was aware of Ms. Intersimone's alleged original statement concerning the presence of others at the time of Keno's approach, he made no effort on behalf of his client to have Judge Owen conduct a further *voir dire* in the midst of the trial itself, a failure simply inconsistent with any suggestion that there was a reasonable basis for him to believe other jurors were involved in misconduct.**

Nor can the meagerness of Moten's post-trial showing be explained, as the panel opinion appears to suggest, by the fact that the defendants were thwarted from conducting an independent investigation of the jury incident.

* Ms. Intersimone had originally made this comment in her *in camera* statement to Judge Owen.

** The fact that Doe, who knew all that there allegedly was to know, did not press for a more intensive *voir dire* is the best evidence to refute the panel opinion's suggestion that defense counsel would have sought a further *voir dire* had they been provided with Ms. Intersimone's *in camera* statement to the judge. Slip op. at 3123. Although the panel opinion raises a question as to whether or not "Doe" was present for her statement, slip op. at 3100, "Doe" was present, as an earlier opinion of this Court has noted. *In Re Grand Jury Subpoena Served Upon Doe*, *supra*, 551 F.2d at 900, n.2. Moreover, Moten specifically opposed any *voir dire* at all. Accordingly, the panel's reluctance to find a waiver of this claim under the Court's rule announced in *Gersh y. United States*, 328 F.2d 460, 463 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964), or at a minimum to remand for alternative proceedings less drastic than a second *voir dire*, is totally unwarranted.

Indeed, Judge Owen had a right to evaluate the unpersuasive offer made by Moten against the background of the extensive and unfettered opportunity of which defendants previously made use to interview jurors without the supervision of the trial judge in the two and one-half months that elapsed between the time of the verdict and the court's imposition of its protective order on January 31, 1977. Judge Owen was aware that the defendants, under questionable circumstances, earlier had conducted their own investigation of the jury, had interviewed the jury forelady without seeking the Court's permission, and had failed to uncover evidence of taint. The panel opinion, in calling for "sunlight" to illuminate the proceedings, slip op. at 3108, inexplicably ignores these facts of record.*

In sum, we respectfully submit that the panel opinion incorrectly concludes as a factual matter** that "reason-

* The district judge was aware of numerous other facts of record that also strongly tipped the balance against a second *voir dire*. First, the Court had objective evidence before it of the jury's impartiality both in the objective fashion in which the jury conducted its week-long deliberations and in the verdicts themselves—seventeen convictions, four acquittals and a disagreement, including conviction of some defendants on some counts and acquittal of the same defendants on others. The verdicts demonstrated, as another panel of this Court has already held, that the jury reached its decision on the merits. *United States v. Moten*, *supra*, 564 F.2d at 628. At the same time the judge also knew that jury tampering had once been planned by the defendants, *In Re Grand Jury Subpoena Served Upon Doe*, *supra*, 551 F.2d at 900, and that defendants, such as those in this case, who corrupted a juror and threatened the lives of witnesses might not stop short of dealing with jurors in similar fashion if provided with a second opportunity for a *voir dire*. Finally, the Court also heard juror Blau state on the tape recording that the jury never even speculated about the reasons for Keno's discharge. (Memorandum Opinion of Judge Owen, p. 4).

** In addition to the "Doe" affidavit, the panel opinion discusses the Blau affidavit, without fully explaining its significance. Slip op. at 3105. The affidavit states no more than that two

[Footnote continued on following page]

able grounds exist" to undertake the type of *voir dire* investigation now ordered in the post-trial setting.*

jurors often ate lunch with Keno and enjoyed a rapport with him.

The two jurors, numbers two and eight, were questioned by the trial judge after Keno's dismissal. Both answered the judge's questions to his satisfaction and no defendant asked for further questioning after hearing their responses read back to them in open court by the court reporter. The panel opinion notes that the jurors' responses "are worthy of mention here," slip op. at 3102, although it declines to say why that is so. The trial judge, who sat face-to-face with the jurors and who was clearly in the best position to assess their demeanor, did not find their responses unusual, nor apparently did two prior panels of this Court, which in *Doe* and *Moten, supra*, failed to find anything in these responses to compel further inquiry.

The Government submits that there is absolutely nothing in either the Blau affidavit or the jurors' responses that justifies the panel's decision.

* In apparently concluding that the "Doe" hearsay affidavit amounted to a showing sufficient to warrant the extraordinary remedy of a *second voir dire* in this case, the panel opinion ignores the fact that none of the cases cited in support of a remand required such a *second* interrogation after the jury had been polled at trial. See cases cited at slip op. 3121. Moreover, the panel opinion erroneously brushes aside two opinions of this Court which make clear the manifest inappropriateness of the remand ordered in this case. Thus, the panel opinion dismisses *United States v. Allied Stevedoring Corp.*, 258 F.2d 104, 105-106 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958) — upon which Judge Owen in part relied — as standing for no more than the "unexceptional proposition that a convicted defendant should not be allowed to waste the time of a district judge or inconvenience jurors merely to conduct a fishing expedition," slip op. at 3122. This off-hand comment hardly comes to grips with Judge Clark's holding in *Allied Stevedoring* that a hearsay affidavit containing the statement of a clearly available witness is patently inadequate to justify a hearing. 258 F.2d at 106. See also, *United States v. Francis*, 525 F.2d 27, 31 n.7 (2d Cir. 1975) (no hearing required where claim of misconduct supported solely by hearsay affidavit). Similarly, the panel's opinion does not adequately address *King v. United States, supra*, decided two weeks before the panel opinion. *King* presented on its face a stronger argument for a post-trial hearing than this one, yet no such hearing was required. In that case, the defendant sought to bomb the home of

[Footnote continued on following page]

Finally, the harm in the panel opinion's erroneous interpretation of the record is aggravated by its failure to give proper weight to the substantial public interest against a second jury *voir dire* at this late hour in the history of this prosecution. The juror misconduct incident in this case was prompted solely by defendants' corrupt efforts to tamper with the jury. Thus, quite apart from the intrusion into the confidentiality of the jury's deliberations invited by the remand, the panel's decision unintentionally, but inevitably, rewards these defendants and those in the future who are corrupt enough to attempt to tamper with the jury, by enlarging their chance of ultimate success: defendants may secure a corrupt verdict at trial; or they may lead a trial judge into error in dealing with his discovery of an attempt to corrupt, and thereby hope to secure a reversal on appeal; or, failing in these efforts, they may now seek to upset the verdict years later by post-trial maneuvers upon only the thinnest and most speculative of showings. Such control over the course of a criminal proceeding should not be placed in the hands of defendants, particularly on a showing as

an FBI agent during a weekend recess in his trial, was shot during the episode, hospitalized, and was unable to be present during the trial which continued in his absence. During the trial defense counsel asked the court to question the sequestered jury to determine whether any juror had learned of the weekend's events, which had been the subject of substantial publicity. The trial judge denied the request. In connection with post-trial motions, the defendant submitted a notarized and witnessed first-hand affidavit from a juror indicating that, though sequestered, she read articles about the case, watched news briefs and knew why the defendant was in the hospital. In addition, the defendant submitted a statement by the manager of the hotel in which the jurors were lodged, explaining how the jurors may have had access to information about the bombing episode. Upon this showing the defendant's motion for a jury interview was denied. This Court affirmed, characterizing this submission, *though it contained a first-hand affidavit of a juror*, as "weakly authenticated, vague and speculative." In this Court's view the defendant had sustained only a "frail and ambiguous showing." Slip op. at 2940.

porous as the one made here, and in the face of factual findings by a district judge that fully supported a decision, committed to his discretion, not to *voir dire* the jury.*

Accordingly, we respectfully urge the panel or the Court *en banc* to review and correct the disturbing precedent created by the panel opinion which promises confusion, uncertainty and an unwarranted windfall to defendants in this and future cases.**

* A defendant serving a substantial sentence has little to lose by attempting to obstruct justice once he gains an opportunity for a second *voir dire* of the jury. If he is unsuccessful in his efforts, even if caught and convicted the increased sentence can have no probable effect upon his future status. Since the possible gains from a successful effort to obstruct are so great, and the risks non-existent, any lowering of the *King* standard is nothing less than an open invitation to convicted defendants to threaten and coerce jurors.

** By affirming, this Court would not leave the defendants without remedy. They would be free, as they have always been, to secure affidavits from Ms. Intersimone, Keno, or even other defendants with direct knowledge on the issue of alleged taint and submit them to the district judge upon a new motion for permission to interview some or all of the members of the jury.

Finally, we should add that while we strenuously believe the panel opinion is incorrect on the merits of the issue of remand for a second *voir dire*, at the very least the opinion's failure to consider alternatives less drastic than a remand for a full-dress jury investigation compels a rehearing in this case. Far preferably to interviewing all twelve jurors would be an inquiry limited to calling Keno, Ms. Intersimone and "Doe." Indeed, since at most the defendants claim only that either juror number two or number eight had knowledge of the Keno incident, it would appear that any remand should be confined to a questioning of these two jurors alone, and not the entire panel.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DANIEL J. BELLER,
FREDERICK T. DAVIS,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

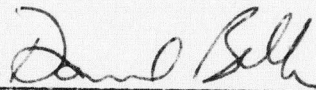
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DANIEL J. BELLER
being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 6th day of July, 1978
he served 2 copies of the Petition of Rehearing
by placing the same in a properly postpaid franked
envelope addressed:

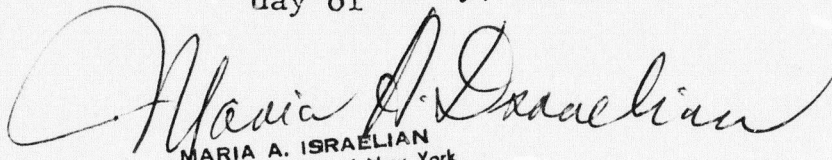
Ivan S. Fisher, Esq.
400 Park Avenue
New York, New York 10022

And deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.



DANIEL J. BELLER

Sworn to before me this
6th day of July, 1978



MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

80